

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

In the Dig Safe Act of 2016 (SB 661, Chapter 809, Statutes of 2016) (the “Act”), the Legislature expressed its commitment to safe excavation around subsurface installations through a number of changes to article 2, chapter 3.1, division 5, of title 1 of the Government Code (the “Article”). In 2015, the year before the Act’s enactment, two persons were killed, a dozen others injured, when heavy machinery cut into two underground natural gas pipelines in both Fresno and Bakersfield. These were but two of the more than 5,000 natural gas pipelines struck in 2015. (California Regional Common Ground Alliance, *2015 CARCGA Facility Event Report*, p. 8.) The same year, the U.S. Department of Transportation’s Pipeline and Hazardous Materials Administration (“PHMSA”) published its final rule on state damage prevention programs, in which states would be evaluated for adequate enforcement of their one-call laws starting in 2016. Determinations of inadequacy could lead to loss of federal funding for pipeline safety programs and federal enforcement against state excavators and subsurface installation operators. (Letter from Alan K. Mayberry to Attorney General Kamala Harris, December 22, 2015.)

A notable feature of the Act was the creation of the California Underground Facilities Safe Excavation Board (the “Board”), whose mission is to coordinate the state’s safe excavation education and outreach activities, develop standards, investigate possible violations, and ensure enforcement of the Article through recommendations to jurisdictional state and local agencies or through direct enforcement action. (Gov. Code, §§ 4216.6, 4216.12.) The Board is authorized to adopt regulations necessary or proper to carry out the purposes and intent of the Act and to exercise the powers and duties conferred upon it by the Act, and is required to adopt regulations to establish minimum elements for onsite meetings and agreements for areas of continual excavation near high priority subsurface installations². (Gov. Code, §§ 4216.11 and 4216.22.)

In passing the Act, the Legislature acknowledged existing law was not suitable for agricultural or flood control activities because it required each excavator to call the appropriate regional notification (“one call”) center¹ at least two days prior to excavation. If a high priority subsurface installation was present, the excavator was required to have an onsite meeting with the operator to discuss the proposed excavation, and how to operate safely over the high priority subsurface installation. Following the onsite meeting, the excavator would receive a ticket for 28 days to perform the excavation, only to have to renew the ticket prior to the end of the 28 days and repeat the process if additional

¹ “Regional Notification Center” is a non-profit association of operators that provides notifications to utility operators of excavations close to existing facilities to protect them from damage, removal, relocation, or repair. California has two regional notification centers: Underground Service Alert (“USA”) North 811, located in Concord, CA, covers Northern California, and Underground Service Alert of Southern California (“DigAlert”), located in Corona, CA, covers Southern California.

² “High priority subsurface installation” means high-pressure natural gas pipelines with normal operating pressures greater than 415Kpa gauge (60psig), petroleum pipelines, pressurized sewage pipelines, high-voltage electric supply lines, conductors, or cables that have a potential to ground of greater than or equal to 60kv, or hazardous materials pipelines that are potentially hazardous to workers or the public if damaged.

excavation work was necessary during the year. This process made it cumbersome and costly for excavators to conduct their daily business.

To address this issue, the Legislature established an annual notification system for areas of continual excavation (Gov. Code section 4216.10). This system would allow excavators to call the one call centers once a year before excavating and request a ticket for normal farming or flood control practices for a one year period. In cases where a high priority subsurface installation is present, an onsite meeting between the excavator and the operator must occur, and both sides must discuss and agree on the proposed excavation, and the safe excavation practices to be used when excavating near the high priority subsurface installation. However, minimum standards do not exist for what must be discussed in the case of agriculture and flood control. The lack of minimum standards has led to inconsistent standards, which has created confusion in the areas of continual excavation. The Legislature tasked the Board to develop minimum elements for the onsite meeting and mutually agreed-upon plan between excavators and operators for high priority subsurface installations on areas of continual excavation through regulations by January 1, 2020 (Gov. Code section 4216.11).

BENEFITS

The benefits of the proposed regulations are establishment of investigatory and enforcement processes, as well as minimum elements for onsite meetings and agreements for areas of continual excavation near high priority subsurface installations, to enable the Board to carry out the purposes and intent of the Act and to exercise the powers and duties conferred upon the Board by the Act. The proposed regulations will create a fair, balanced process that promotes shared responsibility for safety between excavators and operators regarding excavation around subsurface installations. The specific benefits anticipated from the proposed regulations include increased safe excavation practices near subsurface installations through investigations of possible violations of the Article, and enforcement of the Article; and implementation of a system that allows agricultural and flood control operations to operate with less disruption to daily activities while complying with safe excavation practices near subsurface installations.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Board relied on the following sources:

- 2018 State Damage Prevention Program Grants, California. Agreement 693JK31840006PSDP, <https://primis.phmsa.dot.gov/sdp/PrjHome.rdm?prj=792&s=766023DFA07C463C86C25F76A53F213B&c=1&nocache=2783&nocache=3158>, accessed on May 7, 2019.
- Andrew J. Wistrich, *Using an Overall Page Limit to Improve Motion Practice* (Vol. 37, Issue 2, Summer 2000) Court Review, The Journal of the American Judges Association, <http://aja.ncsc.dni.us/publications/courtrv/cr37/cr37-2/CR37->

- [2Wistrich.pdf](#), accessed on May 7, 2019.
- California Regional Common Ground Alliance, *2015 CARCGA Facility Event Report*, [http://osfm.fire.ca.gov/codedevelopment/pdf/title19/CARCGA%20DIRT%20Report 2015.pdf](http://osfm.fire.ca.gov/codedevelopment/pdf/title19/CARCGA%20DIRT%20Report%202015.pdf), accessed on May 7, 2019.
 - California Regional Common Ground Alliance, *2016 CARCGA Incident Event Report*.
 - California Regional Common Ground Alliance, *2017 CARCGA Incident Event Report*, https://www.digalert.org/pdfs/2017_CADIRT_Report.pdf, accessed on May 7, 2019.
 - Common Ground Alliance Best Practices 15.0 (March 2018), <https://www.digalert.org/pdfs/bestpractices.pdf>, accessed on May 7, 2019.
 - Common Ground Alliance, *DIRT Report for 2016: Analysis and Recommendations*, (Vol. 13, August 2017), https://commongroundalliance.com/sites/default/files/publications/DIRT%202016%20Annual%20Report_081017_FINAL_Updated_09.20.17.pdf, accessed on May 7, 2019.
 - “Excavation Damage Prevention Group Report,” *Integrity Management for Gas Distribution: Report of Phase 1 Investigations*, December 2005, <https://www.phmsa.dot.gov/pipeline/gas-distribution-integrity-management/dimp-integrity-management-gas-distribution-report-of-phase-1-investigations-2005>, accessed on May 7, 2019.
 - Letter from Alan K. Mayberry to Attorney General Kamala Harris, December 22, 2015
 - Letter from Alan K. Mayberry to Attorney General Kamala Harris, December 28, 2016, [http://osfm.fire.ca.gov/codedevelopment/pdf/title19/PHMSA_Determination_Letter California_12-28-16.pdf](http://osfm.fire.ca.gov/codedevelopment/pdf/title19/PHMSA_Determination_Letter_California_12-28-16.pdf), accessed on May 7, 2019.
 - Letter from Alan K. Mayberry to Executive Officer Tony Marino, May 18, 2018, <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/safety-awareness/pipeline/9111/inadequacy-letter-ca-v4-php-18-0065.pdf>, accessed on May 7, 2019.
 - Maryland Underground Facilities Damage Prevention Authority, *Seventh Report to the Governor and General Assembly of Maryland*, January 2018, <https://mddpa.org/wp-content/uploads/2018/02/Seventh-Annual-Report-Final-Draft.pdf>, accessed on May 7, 2019.
 - Online surveys created by the Board, to which (1) operators and (2) California Farm Bureau Federation members were invited to take (09/26/2018 to 10/31/2018) and results of those two surveys.
 - PHMSA Incident Report No. 20050079-9682
 - PHMSA Incident Report No. 20050082-1805
 - PHMSA Incident Report No. 20060003-1711
 - PHMSA Incident Report No. 20090042-9683
 - PHMSA Incident Report No. 20090083-6100
 - PHMSA Incident Report No. 20090116-6765

- PHMSA Incident Report No. 20100054-15080
- PHMSA Incident Report No. 20100083-15106
- PHMSA Incident Report No. 20100109-16247
- PHMSA Incident Report No. 20110273-16823
- PHMSA Incident Report No. 20110374-15349
- PHMSA Incident Report No. 20120122-15957
- PHMSA Incident Report No. 20120129-16275
- PHMSA Incident Report No. 20130047-16341
- PHMSA Incident Report No. 20130107-16258
- PHMSA Incident Report No. 20130118-16218
- PHMSA Incident Report No. 20140126-16552
- PHMSA Incident Report No. 20140142-16583
- PHMSA Incident Report No. 20150066-16758
- PHMSA Incident Report No. 20150139-16930
- PHMSA Incident Report No. 20160065-17164
- PHMSA Base Grant Payment Information, 2008-2016, <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/pictures/Base%20Grant%20Payment%20Info%202008-2016.pdf>, accessed on May 7, 2019.
- Ray and Bishop, "FAQs about California Licensing Matters: How much does it cost to hire an attorney," <http://www.calicenselaw.com/FAQs.aspx#Cost>, accessed on May 7, 2019.
- Salary Information from indeed.com, glassdoor.com, and USA North 811
- "Staff report: Discussion on Area of Continual Excavation Ticket Renewal Requirement (Government Code section 4216.10(e)), " Agenda Item 10, February 12, 2019, <https://digsafe.fire.ca.gov/media/1879/agenda-item-10-area-of-continual-excavation-renewal-ticket-requirement.pdf>, accessed on May 7, 2019.
- U.S. Department of Transportation, Federal Aviation Administration, Order 8000.373 (06/26/15), https://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentID/1027891, accessed on May 7, 2019.
- U.S. Department of Transportation, Federal Aviation Administration, Order 8000.373A (10/31/18), https://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentID/1034828, accessed on May 7, 2019.

Documents Incorporated by Reference:

The following forms are incorporated by reference in the text of the proposed regulations:

1. Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)); and
2. Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)).

It would be cumbersome, unduly expensive or otherwise impractical to publish these

documents in the California Code of Regulations. The documents are made available from the agency, or are reasonably available to the affected public from a commonly known or specified source (made available on the Board's website: <https://digsafe.fire.ca.gov>).

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The economic impact of these regulations can be organized into three overall categories:

- 1) Economic impact associated with notification to the regional notification center when a reportable damage occurs,
- 2) Economic impact associated with enforcement of the Article, and
- 3) Economic impact associated with the onsite meeting requirement of the new area of continual excavation ticket.

For each, the impact may be split into a cost impact and a benefit impact. The following is organized to outline the costs of each of these three regulation elements first, and then consider their benefits. Average pay numbers were obtained for California occupations from indeed.com or glassdoor.com. Average regional notification customer service representative pay numbers were obtained in consultation with USA North.

Costs associated with notification to the regional notification center when a reportable damage occurs

The notification costs can be divided into costs for two types of entities: The cost for an excavator to notify the regional notification center of an incident, and the cost of the regional notification center to accept the damage notification and transmit it to the Board. An excavator will only incur a cost if an incident reportable pursuant to subdivision (a) of proposed section 4100 occurs.

It is estimated that a notification to the regional notification center by an excavator will take approximately 5 minutes, whether the notification is submitted electronically or via a phone call. The hourly rate of pay for a construction foreman, the individual most likely responsible for calling in a damage notification, is approximately \$26/hour. At this hourly rate, the cost to the excavator would be \$2.16 per damage notification.

The cost to the regional notification center to receive and process the notification would be the cost of a customer service representative taking a 5-minute call at an hourly rate of \$22/hour. Receiving a notification electronically would have negligible marginal cost, but the conservative assumption is made that all notification will be received by the regional notification center by telephone. At this rate, each call would cost \$1.83. Once the regional notification center receives a notification from an excavator, the notification is sent to the Board electronically. The one-time costs to modify the regional notification center's information technology to accept electronic notification from excavators and transmit it to the Board is covered by a \$70,000 grant awarded by PHMSA in 2018.

As explained above, there are approximately 5,000 reportable damages expected in the state annually. Of those damages, 20-25% are from homeowners, who are not subject to the Article and by extension not subject to the proposed regulation, so the number of

notifications required by this regulation is expected to be approximately 4,000 per year. As the marginal cost to the excavator of notification is \$2.16 and the marginal cost to the regional notification center of notification is \$1.83, the total expected cost for notifications annually is expected to be $(\$2.16 + \$1.83) \times 4,000 = \$15,960$.

Costs associated with enforcement of the Article

The costs associated with enforcement of the article are costs to the respondent to participate in an enforcement case upon receiving a notice of probable violation.

The cost to the respondent depends on the way in which they choose to respond to a notice of probable violation. If the respondent chooses not to contest a violation, the costs would be relatively low. If, on the other hand, the respondent requests a formal hearing, the cost would be significantly higher. Similar agencies in other states suggest that few if any respondents choose to request a formal hearing, as the decision maker following formal hearing is the same as the decision maker following informal hearing: the Board. Nonetheless, we estimate the following distribution of responses to a notice of probable violation:

No contest (§ 4252 (a)(1)): 395 per year at \$200 each
Written response (§ 4252 (a)(2)): 500 per year at \$1,000 each
Informal hearing (§ 4252 (a)(3)): 100 per year at \$5,000 each
Formal hearing (§ 4252 (a)(4) & § 4252 (a)(5)): 5 per year at \$10,000 each

The above distribution assumes, as described above, that Board staff will investigate 2,000 incidents per year. It also assumes that of those 2,000 investigations, half will lead either no action or a warning letter and the other half will lead to a notice of probable violation. For the “formal hearing” category, we do not distinguish between formal hearings held under the Board’s jurisdiction and formal hearings held under CSLB, CPUC, or OSFM jurisdiction. The cost of formal hearing was estimated based on typical insurance coverages for licensed professionals for administrative hearings as reported by the law firm of Ray and Bishop.

The total annual cost to respondents is therefore $(395 \times \$200) + (500 \times \$1,000) + (100 \times \$5,000) + (5 \times \$10,000) = \$1,129,000$.

Costs associated with the onsite meeting requirement of the new area of continual excavation ticket

The costs associated with the onsite meeting requirement of the new area of continual excavation ticket can be categorized as costs to the farmer or flood control operator and costs to the operators of high priority subsurface installations. These regulations only affect onsite meetings required due to the presence of a high priority subsurface installation.

The costs to the farmer and flood control facility operator are simple: as this type of ticket is optional to the farmer and flood control facility operator, there are no added costs. These excavators could choose to continue to make notifications pursuant to Government Code

section 4216.2 instead of Government Code section 4216.10.

On the other hand, response to a ticket—whether notified pursuant to Government Code section 4216.2 or Government Code section 4216.10—is not optional for the subsurface installation operator, and the subsurface installation operator does not get to choose under which section to respond.

Regardless of whether a ticket is requested by the excavator pursuant to Government Code section 4216.2 or Government Code section 4216.10, an onsite meeting is required for an area of proposed excavation which includes a high priority subsurface installation. Under current practice for onsite meetings held pursuant to Government Code section 4216.2, a locator is often sent by the operator to participate in the meeting. The hourly rate of pay for these individuals is estimated at \$14.62. Proposed sections 4302 and 4351, however, suggest that the person with knowledge of the location of the high priority subsurface installation be a superintendent, supervisor, or engineer. The operators participating in Board workshops have suggested that an engineer is likely the person with the requisite information, and that is who they would send to an onsite meeting. The hourly rate of pay for a mechanical engineer is estimated at \$41.75.

The cost difference between responding to a ticket under current law (Government Code section 4216.2) and responding to a ticket pursuant to Government Code section 4216.10 as articulated in sections 4301 and 4351 of the proposed regulations is determined by the differential between these two salaries, the time required to conduct the onsite meeting pursuant each type of response, and the number of onsite meetings that would happen under each code section.

The average time required for an operator to undertake an onsite meeting under both the current Government Code section 4216.2 requirement and the proposed regulation is expected to be one hour, the primary component of that time being travel.

The number of onsite meetings required Government Code section 4216.10 is one per ticket per year. The number of onsite meetings for tickets notified under Government Code section 4216.2 is assumed to also be one per year as excavators are not required to have a field meet for renewed tickets. This assumption is conservative, as farmers and flood control facility operators are unlikely to perform excavation every 28 days, so tickets requested pursuant to Government Code section 4216.2 would likely expire for farming and flood control facility activities at least once per year, requiring more than one onsite meeting.

The final cost driver for operators is the number of areas of continual excavation in the state. We make the assumption that all farmers and flood control facility operators in the state will choose to request an area of continual excavation ticket, requiring an onsite meeting pursuant to the proposed regulations, as this ticket was created by the Legislature to be more convenient for these two communities. The cost to subsurface installation operators would be the highest under this scenario. The number of agricultural parcels in the state with hazardous liquid or natural gas transmission high priority subsurface installations is approximately 24,393, as determined by a staff analysis of federal pipeline data. The number of flood control facilities eligible for area of continual excavation tickets is

far smaller. Few other high priority subsurface installations are expected in these areas, as high voltage electric lines are almost always overhead and pressurized sewage pipelines are usually found in urban areas. We can therefore safely assume that the highest number of areas of continual excavation in a year would be 25,000.

The cost of compliance with sections 4301 and 4351 of the proposed regulations would therefore be:

$$((1 \times \$41.75) - (1 \times \$14.62)) \times 1 \text{ hr} \times 25,000 \text{ parcels} = \$678,250$$

Benefits associated with the proposed regulations

The benefits analyzed for these regulations are those associated with reduced damage to infrastructure, as the number of damages is statistically predictable. No attempt was made to consider catastrophic damages—those which lead to serious injury and fatality—as such damages numbers are much more difficult to predict, and attempting to attribute a reduction of such damages to these specific regulations would require foolhardy assumptions. Nonetheless, were these regulations to prevent even one catastrophic damage, the financial benefit would likely outweigh the benefits of preventing all annual routine damages, not even considering the benefit to life and health.

The most quantifiable benefit to these regulations are the effect of the Article's enforcement to reduce damages. An effective damage prevention enforcement program is widely understood to reduce the number of damages. A study conducted in 2004 by a group under the direction of PHMSA found that

States with comprehensive damage prevention programs that include effective enforcement have a substantially lower probability of excavation damage to pipeline facilities than states that do not. The lower probability of excavation damage translates to a substantially lower risk of serious incidents and consequences resulting from excavation damage to pipelines.²

The study found that states with effective enforcement programs had 25.9% fewer gas distribution pipeline damages than those with ineffective programs. The study also found that states saw a reduction in damages of 30% or more in the years immediately subsequent to implementing enforcement.³

The cost of a damages has been studied by the Common Ground Alliance, who found the average cost of a natural gas pipeline damage nationwide in 2016 to be \$5,914.05. If we assume a 25% reduction in natural gas pipeline damages, we can expect the economic benefit to California to be \$7,392,562.50. In reality, we expect the economic benefit to be higher, as the damage reduction benefits of enforcement have primarily been attributed to increased compliance with requirements to notify the regional notification centers prior to undertaking excavation. As one doesn't know what he or she might damage when

² "Excavation Damage Prevention Group Report," Integrity Management for Gas Distribution: Report of Phase 1 Investigations, December 2005, Attachment C, p. 1.

³ *Id.* at p.3

excavating without having the utilities come out and mark, one would expect that the effect of enforcement would reduce “no-call” damages to all types of infrastructure in the same proportion. As the percentage reduction of damages by cause is not identified in the PHMSA study, the economic benefit of enforcement attributable to damage reduction for other types of subsurface installations is not estimated.

The assertion that enforcement leads to fewer damages is enforced through federal regulations, as PHMSA evaluates states on their damage prevention programs, and has found California “inadequate” for the past two years because of a lack of state level enforcement of the Article. If a state’s damage prevention program is found inadequate for five years in a row, that state’s pipeline safety programs, such as those run by the CPUC and OSFM, are subject to a four-point deduction in their scores. As a state’s funding is proportional to a state’s score (out of 100 points), a four-point deduction is equivalent to a four-percentage point loss in federal funding, which covers up to 80% of a state’s pipeline safety program cost. In 2016, the CPUC’s program cost \$5,304,515 and OSFM’s program cost \$3,105,748. A four-point loss to both programs would then cause a reduction of funding of

$$\begin{aligned}(\$5,304,515 \times 80\%) \times 4\% &= \$169,744.48 \text{ (CPUC)} \\(\$3,105,748 \times 80\%) \times 4\% &= \$99,383.94 \text{ (OSFM)}\end{aligned}$$

The enforcement provisions of this regulation can therefore be anticipated to have up to \$269,128.42 of benefit to the state’s budget.

In totaling up the economic costs outlined above, we anticipate them to be no more than:

$$\$15,960 + \$70,000 + \$1,129,000 + \$678,250 = \$1,893,210$$

Of which \$70,000 has already been allocated through either the Budget Act of 2018 or a federal grant.

The direct economic benefits outweigh the costs of the regulation and are anticipated to be at least:

$$\$7,392,562.50 + \$269,128.42 = \$7,661,690.92$$

The Board concludes that it is:

- (1) unlikely that the proposed regulations will create or eliminate any jobs within the state;
Stakeholder representatives were consulted during development of the proposed regulations. It is unlikely that the proposed regulations will have an impact on the creation or elimination of jobs on the businesses of excavators and operators as the proposed regulations likely will not significantly or fundamentally change the way they do business.

- (2) unlikely that the proposed regulations will create new businesses or eliminate any existing businesses within the state;
The proposed regulations implement the Board's investigatory and enforcement processes under existing law, as well as minimum elements for onsite meetings and agreements, which is required to occur under existing law, for areas of continual excavation near high priority subsurface installations, and thus, it is unlikely that the proposed regulations will impact the business environment by creating new businesses or eliminating existing businesses.
- (3) unlikely that the proposed regulations will affect the expansion of businesses currently doing business in the state;
The Board has determined that this regulatory proposal will unlikely limit or discourage the expansion of existing businesses within the state.
- (4) The benefit to the public is the protection of life, property, and environment.
Through the proposed regulations that establish investigatory and enforcement processes, as well as minimum elements for onsite meetings and agreements for areas of continual excavation near high priority subsurface installations, the Board will be able to carry out the purposes and intent of the Act, which includes protection of life, property, and environment by preventing damages to subsurface installations.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Although the proposed action will directly affect businesses statewide, including small businesses, the Board concludes that the economic impact, including the ability of California businesses to compete with businesses in other states, will not be significant.

The economic impact analysis above highlights how the costs of notification are small and the response options a business has when receiving a notice of probable violations are many, allowing a business to determine the level of financial investment it wants to place into its defense. The highest cost burden lies on operators of high priority subsurface installations that run through areas of continual excavation, but the benefit they receive through a reduction of damages appears to outweigh that cost.

The proposed regulations implement the Board's investigatory and enforcement processes under existing law, as well as minimum elements for onsite meetings and agreements, which is required to occur under existing law, for areas of continual excavation near high priority subsurface installations. Therefore, the proposed regulations will not have a significant statewide adverse economic impact directly on excavators and operators.

CONSIDERATION OF REASONABLE ALTERNATIVES TO THE REGULATIONS AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

An alternative to proposed regulations on damage notification would be to not require damage notification and instead rely on voluntary reporting. Maryland, for example, is not notified of damages and only investigates complaints. Its complaint-based system, however, has led to very few complaints—87 in its most active year (2016)—leading to very little in the way of enforcement. This alternative is inconsistent with the Legislature's charge to investigate accidents and improve safety.

Another alternative to proposed regulations on damage notification would be to require notification of all damages, not merely those listed in paragraph (a) of section 4100 of the proposed regulations. The notification requirement exists to provide Board investigators with just enough information to decide whether to investigate an accident, and expanding it to damages of more types of subsurface installations would add burden on excavators with little benefit to the Board.

A third alternative to proposed regulations on damage notification would be to require damage notifications to be made directly to the Board instead of having notifications go through the regional notification centers. Excavators do not know the Board, but instead have regular communication to and from the regional notification centers. Requiring an excavator to have a special means of notification to the Board that only applied in the high-stress situation of a damage would often lead to late notification or no notification at all. Putting excavators through training so that they would be prepared to use this special means of notification to the Board would be significant effort to little benefit when the regional notification center is already familiar to them with a phone number ("811") they know by heart.

An alternative to proposed regulations on investigator authority may be Board delegation or authorization through resolution on a case by case basis, which would be inefficient and impractical. Investigators need broad delegated authority to conduct investigations without having to seek Board approval for every matter. The proposed regulations also inform the public of the investigators' authority.

An alternative to proposed regulations on sanctions may be to solely impose monetary penalties (Gov. Code section 4216.6). However, monetary penalties alone may not address the root cause of violations, which may require corrective action to educate and improve business practices for safe excavation.

An alternative to proposed regulations on enforcement may be to provide due process through a formal hearing process option only. However, this alternative would not provide respondents with less complex options to challenge a notice of probable violation, and would not offer respondents under another state agency's jurisdiction with the opportunity to address the Board regarding a possible enforcement recommendation.

An alternative to proposed regulations on area of continual excavation onsite meetings where representatives of excavators and operators at the onsite meeting must have the relevant knowledge and authority to execute the agreement is to allow excavators and operators to

send the agreement to the persons who have the knowledge and authority. However, this practice would delay the onsite meeting and agreement process. The purpose of an onsite meeting is to have the meeting onsite with all the relevant persons from each side present. Delay in the onsite meeting and agreement process would disrupt the excavators' and operators' business operations, leading to increased business costs to stop or postpone work or reschedule the completion of the onsite meeting while each party obtained the necessary information or authorization to enter into the agreement.

An alternative to proposed regulations on area of continual excavation requiring excavators and operators to use a standardized form (Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) and Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020))) is to allow excavators and operators to create their own forms. However, existing practices of using a form created by one party has led to frustration due to inconsistencies among the agreements and parties. A standardized form streamlines the onsite meeting process and helps ensure that the parties address the minimum elements for an agreed-upon plan. Businesses may save costs by not having to create a form for each onsite meeting.

No alternatives were presented to or considered by the Board that would be less burdensome and equally effective in achieving the purposes of the proposed regulations in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulations (Gov. Code section 11346.2).

REASONABLE ALTERNATIVES – SMALL BUSINESS

The proposed regulations have no substantial effect to small business. The Board has identified no alternative that would lessen adverse impact, if any, on small business and still allow the Board to effectively enforce the regulations.

DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS

The Board has not found any unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues as this proposed rulemaking action. To the contrary, federal statute and regulations support the functions implemented by the Board under the proposed regulations. Section 60134 of Title 49 of the United States Code states nine elements that are found in effective state damage prevention programs, including enforcement of the state's damage prevention law. PHMSA conducts evaluations (pursuant to Section 60114 of Title 49 of the United States Code and Subpart D of Part 198 of Title 49 of the Code of Federal Regulations) to determine the adequacy of state damage prevention programs. On December 28, 2016, PHMSA Associate Administrator Alan Mayberry conveyed in a letter to Attorney General Kamala Harris PHMSA's determination that California had an inadequate damage prevention program for lack of the function that the Legislature created the Board to perform. On May 18, 2018, Associate Administrator Mayberry sent another letter, this time to California Underground Facilities Safe Excavation Board Executive Officer Tony Marino noting that for a second year PHMSA determined California's damage prevention program

to be inadequate for lack of enforcement of the Article.

PURPOSE AND NECESSITY

The following sections are added:

Section 4000, subdivision (a)

Purpose: Specify and define terms used in the proposed regulations, as used in the Article, for clarity.

Necessity: This section is necessary to use the same terms and definitions in the Article for consistency with the statute, and to use defined terms that are already familiar with users through Government Code section 4216, rather than expressly repeating the statutory definitions for the same terms used in the regulations.

Section 4000, subdivision (b)

Purpose: Specify and define the following terms used in the proposed regulations for clarity: “Act”, “Agreement”, “Area of Continual Excavation Agreement (Agricultural Operations)”, “Area of Continual Excavation Agreement (Flood Control Facilities)”, “Business day”, “Damage”, “Farm Owner/Lessee”, “Flood control facility”, “Investigator”, “One-call center”, “Record”, “Respondent”, “Staff”, “Utility”, and “Utility Owner”.

Necessity: (1) “Act”: The Dig Safe Act of 2016 (SB 661, Chapter 809, Statutes of 2016) and article 2 of chapter 3.1 of division 5 of title 1 of the Government Code (commencing with section 4216) are referred to frequently throughout the proposed regulations. Stating the full name and citation each time the term is used would make the regulations unnecessarily lengthy and difficult to read. (2) “Agreement” must be referred to frequently in the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)). Stating the full name of the form each time the term is used in the form would make the form unnecessarily lengthy and difficult to read. (3) “Agreement” must be referred to frequently in the Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)). Stating the full name of the form each time the term is used in the form would make the form unnecessarily lengthy and difficult to read. (4) “Area of Continual Excavation Agreement (Agricultural Operations)”: Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) must be referred to frequently in the proposed regulations. Stating the full name of the form each time the term is used in the form would make the regulations unnecessarily lengthy and difficult to read. (5) “Area of Continual Excavation Agreement (Flood Control Facilities)”: Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)) must be referred to frequently in the proposed regulations. Stating the full name of the form each time the term is used in the form would make the regulations unnecessarily lengthy and difficult to read. (6) “Business day”: Most of the deadlines in the proposed regulations are calculated according to state work hours and days, and thus, the term must be defined to inform users of the times and days that constitute a “business day”. (7) “Damage”: The term must be defined to specify and limit the term to just those damages to subsurface installations. (8) “Farm Owner/Lessee”: This term is used in place of “excavator” in the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) because it is more familiar to those in the agricultural community; and thus, the form

will be easier to use by the target community that will use the form. (9) “Flood control facility”: This term must be defined to specify the type of flood control facility covered under the Act and proposed regulations. (10) “Investigator” must be defined to specify and describe the investigator referred to in the proposed regulations. (11) “One-call center”: This term is used in place of “regional notification center” in the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) and the Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)) because it is more familiar to excavators and operators; and thus, the forms will be easier to use by the target communities that will use the forms. (12) “Record”: This term must be defined to specify and limit the term to the types of records related, pertaining, or relevant to any damage or probable violation of the Act or the proposed regulations. (13) “Respondent”: This term must be defined to specify the persons affected by the applicable sections in the proposed regulations. (14) “Staff” must be defined to specify and describe the staff referred to in the proposed regulations. (15) “Utility”: This term is used in place of “high priority subsurface installation” in the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) because it is more familiar to excavators within the agricultural community; and thus, the form will be easier to use by the target community that will use the form. (16) “Utility Owner”: This term is used in place of “operator” in the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) because it is more familiar to excavators within the agricultural community; and thus, the form will be easier to use by the target community that will use the form.

Section 4002, subdivision (a) Incorporated References

Purpose: Specify the responsibilities so that the authority for excavation on flood control facilities near a high priority subsurface installation can comply with Government Code section 4216.10.

Necessity: Create standard agreement forms to be used at all onsite meetings between farmers and operators to streamline the on-site meeting process and help ensure that all parties address the minimum elements for an agreed-upon plan. Incorporating the following forms by reference is necessary because it would be cumbersome, unduly expensive or otherwise impractical to publish the documents in the California Code of Regulations: Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) and the Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)).

Section 4003, subdivision (a)

Purpose: Specify the responsibilities of members of regional notification centers so that the regional notification centers can ensure compliance with Government Code section 4216.1 and fulfill their responsibilities to the Board.

Necessity: Regional notification centers (Underground Service Alert—Northern California (“USA North”) and the Underground Service Alert—Southern California (“DigAlert”)) are 501(c)(6) not-for-profit public benefit corporations that are responsible for processing notifications of proposed excavation from excavators and transmitting those notifications to subsurface installation operators who may have subsurface installations in the area. Every operator of subsurface installations is required to participate in the regional notification centers, and every subsurface installation operator, excluding the California Department of

Transportation, is required to share in the costs to operate these centers. (Gov. Code, § 4216.1.) Regional notification centers must have valid and current contact information of its members to perform its functions, as well as comply with California Code of Regulations, title 19, section 4010 and the proposed regulations.

Section 4003, subdivision (b)

Purpose: Specify the responsibilities of regional notification centers to the Board so that the Board has current and correct contact information for operators that must be members of regional notification centers pursuant to Government Code section 4216.1.

Necessity: The Board may need contact information for the members of the regional notification centers to conduct investigations and enforcement actions, as well as for outreach and education purposes.

Section 4100, subdivision (a)

Purpose: Specify the damage events after which an excavator must notify the regional notification centers and the timeframe in which notification must occur so that Board staff may investigate the damage while evidence and witnesses are available.

Necessity: Board investigators need to be notified of a damage so that they can fulfill their legislative mandate in Government Code Section 4216.12 to “investigate possible violations of this article, as described in Section 4216.19.” The Board anticipates that, within five years, when the program is fully operational, that the resources provided by the Legislature will allow staff will be able to investigate up to roughly 2,000 accidents a year, depending on the proportion of field to desk investigations it conducts (field investigations are expected to take longer than desk investigations).

The reporting criteria in paragraphs (1), (2), (3), and (4) were chosen because of the high consequence of such damages, the ease in which an excavator can recognize that he or she has reached the reporting threshold, and the number of expected reports being commensurate with the Board’s investigative capacity.

All damages can be the result of a violation of the article, but Board staff cannot investigate all damages. While the number of damages for all subsurface installations in the state is not tracked and thus not known, one can estimate the number by extrapolating from the number of natural gas pipeline damages submitted voluntarily pursuant to subdivision (g) of Government Code section 4216.6 for the years 2015, 2016, and 2017 (“CARCGA Incident Event Reports”). Each year, natural gas operators submit roughly 5,000 damages to the voluntary reporting system, and this number is believed to contain all damages to the state’s two largest natural gas transmission/distribution companies. According to information submitted by the state’s two regional notification centers, roughly 15% of all regional notification center ticket transmissions were sent to natural gas pipeline operators. With these numbers, we can make a very rough approximation of $5,000/0.15 = 33,000$ damages to all subsurface installations each year.

Of the reporting criteria in paragraphs (1), (2), (3), and (4), criteria (1) pertaining to the release of natural gas or hazardous pipeline contents, will be the criteria under which the vast majority of reports will be made. Comments from natural gas pipeline operators during workshops suggest that roughly 20-25% of these damages are from homeowners, who are

not subject to the requirements of the Article and thus not covered by the requirement in this regulation. Therefore, it is expected that this regulation would lead to up to 4,000 damage reports a year, which is of similar magnitude as the number of investigations Board staff could undertake.

The reporting criteria in paragraphs (1), (2), (3), and (4) are also damages of high consequence. The consequences of injury requiring medical care (paragraph (3)) and fatality (paragraph (4)) are self-evident. The high consequence of events described in paragraphs (1) and (2) are clear in state and federal law. Subdivision (c) of Government Code section 4216.4 requires the excavator to contact 911 emergency services in specific circumstances, including (A) upon discovering damage to a natural gas or hazardous liquid pipeline subsurface installation in which the damage results in the escape of any flammable, toxic, or corrosive gas or liquid and (B) damage to a high priority subsurface installation of any kind. The requirement to contact 911 emergency services upon discovering damage to a natural gas or hazardous liquid pipeline subsurface installation in which the damage results in the escape of any flammable, toxic, or corrosive gas or liquid is also a requirement of federal regulation (Section 109 of Part 196 of Title 49 of the Federal Code of Regulations). That state and federal law require calls to 911 for the damages described in paragraphs (1) and (2) indicates their consequence.

Other types of damages could also lead to significant consequences for service disruption, such as disruption of internet or water service, but an excavator would not have access to information about a service outage and thus would not be able to determine when a damage had reached a reportable threshold. For this reason, service disruption thresholds were not used as reporting criteria.

This subdivision also requires an excavator to notify the regional notification center within two hours of the damage. A time limit is necessary because Board investigative staff would need to be notified of a high consequence damage to a subsurface installation in a timely manner. This proposed regulation would give the Board's investigative staff adequate time to make the decision to dispatch investigators to the scene immediately or schedule a time to meet the excavator at the scene. Investigative staff need be on scene quickly to begin the collection of evidence and to interview witnesses. This is necessary for the Board to achieve its mission to improve public and worker safety by conducting thorough investigations of subsurface installation accidents to determine their cause.

The time limit of two hours was chosen because it was determined that an excavator could reasonably make such a notification in that time. Subdivision (c) of Government Code 4216.4 already requires excavators to immediately contact the subsurface installation operator upon discovering or causing damage to a subsurface installation, damage which includes all breaks, leaks, nicks, dents, gouges, grooves, or other damage. For criteria (1), (2), and (4), state law requires a call to 911. Based on feedback at multiple workshops, the Board determined that an excavator involved in a damage would be able to make notification within two hours.

This subdivision also requires the notification to be made to the regional notification centers. This choice was made because excavators already know how to reach the regional

notification centers, including by calling “811”. While CARCGA Incident Reports indicate that up to 45% of all natural gas pipeline damages are caused by the excavator not contacting a regional notification center, 20-25% are caused by homeowners, and discussion during workshops indicates that 90% of homeowner damages occur without a notification to the regional notification center. If one ignores homeowners, who are not subject to the requirements of the Article, a significant majority of damages occur after someone has already contacted the regional notification center, so those who tend to cause reportable damages are familiar with the regional notification centers. Furthermore, subdivision (c) of Government Code Section 4216.4 specifies that an excavator may contact the regional notification center to obtain the contact information of the subsurface installation operator whose subsurface installation was impacted by the damage. During Board workshops, natural gas operators stated that, for roughly 75% of damages to their subsurface installations, the excavator contacted them directly, while for the other 25% of damages, they learned of the damage from the regional notification centers who, upon receiving a report of a damage, create a “damage ticket” and send that information to all subsurface installation operators in the area of the excavation. It is thus already the practice of many excavators to contact the regional notification centers of a damage, and so requiring excavators to contact the regional notification center in case of damage requires relatively little change in practice.

Section 4100, subdivision (b)

Purpose: Specify the information an excavator shall provide, as may be known to the excavator at the time of notification, to the regional notification center and inform the excavator of what means by which he or she may make such a notification.

Necessity: This information will allow Board investigators to identify the location of damage, identify and contact the operators with utilities in the area and relay the excavators contact information, record the date and time of the incident, identify potential hazards, provide the Board with information to determine whether to deploy an investigator in the field, and record the type of equipment that damaged the utility. The excavator’s contact information is necessary so that Board investigators may know who to contact, to inform a potential investigation but also to assist in coordinating a field visit if Board investigators determine a field visit is necessary. Location information is necessary so that investigators know where the incident took place, both for purposes of deciding whether or not to make a field investigation but also to determine if there are any facilities of interest in the immediate vicinity, such as schools or hospitals. Information regarding the type of subsurface installation is necessary to identify potential hazards as a result of the damage and for the Board to prioritize interest in investigating the incident. The approximate date and time of the damages is necessary for an investigator to determine the extent to which witnesses and evidence may still be present on the scene, which are important factors in determining whether the immediate deployment of an investigator will provide benefit to the investigation. Information as to whether there was injury or fatality is necessary to allow investigators to understand the consequences of the damage. Information as to whether there was a fire or were evacuations as a result of the damage is necessary to allow investigators to understand the consequences of the damage. Information as to the type of excavation equipment or tool used by the excavator when the damage occurred or was discovered is necessary so that investigators may understand what types of violations are possible in the damage situation. The proposed subdivision is necessary to ensure Board

investigators are notified in a timely manner and provided with information necessary to make informed decisions on how to handle the incident.

Section 4100, subdivision (c)

Purpose: Specifies the requirement that the regional notification centers transmit damage notification to the Board within one hour.

Necessity: For Board investigators to be aware of damages reported by excavators pursuant to the proposed subdivisions (a) and (b), the regional notification centers must expeditiously provide those notifications to Board investigators. The regional notification centers already have systems to inform subsurface installation operators of a proposed excavation. During workshops, regional notification center representatives have noted that, as the subsurface installation operators must respond to an excavator as described in subdivision (a) of Government Code section 4216.3 within two working days (subdivision (l) of Government Code section 4216), the regional notification centers provide subsurface installation operators this information in approximately 40 seconds. Regional notification center representatives indicated that damage notification could be sent to Board investigators at a similar speed. In anticipation of this requirement, regional notification centers have begun efforts to implement this requirement, as DigAlert received a \$70,000 State Damage Prevention Grant from the federal Department of Transportation to developing technology to receive damage reports online and transmit information so that investigators can be dispatched.

Section 4150, subdivision (a)

Purpose: Establish and specify the powers of the Board's investigators.

Necessity: Investigators must be authorized to investigate any damage, probable violation of the Act or the regulations, reports of incident events, and complaints of damage or probable violation of the Act or the regulations, to enable the Board to carry out its duties to investigate possible violations and conduct enforcement against those who violate the Act or the regulations. This section is necessary to delegate those powers to the Board's investigators and inform users of those powers of the Board's investigators. Without delegated authority to investigators, the Board will not be able to carry out its duties of investigation and enforcement under the Act.

Section 4150, subdivision (b)

Purpose: Establish and specify the powers of the Board's investigators.

Necessity: The Board has investigatory and discovery powers under state law, including article 2 of chapter 2, part 1, division 3, title 2 of the Government Code (commencing with section 11180) and Code of Civil Procedure section 1822.51. This section is necessary to delegate those powers to the Board's investigators and inform users of those powers of the Board's investigators. Without delegated authority to investigators, the Board will not be able to carry out its duties of investigation and enforcement under the Act.

Section 4150, subdivision (c)

Purpose: Establish and specify the powers of the Board's investigators.

Necessity: Investigators must be authorized to interview witnesses and obtain statements, declarations, verifications, certificates, oaths, or affidavits under penalty of perjury pursuant to Code of Civil Procedure section 2015.5, to enable the Board to carry out its duties to

investigate possible violations and conduct enforcement against those who violate the Act or the regulations. This section is necessary to delegate those powers to the Board's investigators and inform users of those powers of the Board's investigators. Without delegated authority to investigators, the Board will not be able to carry out its duties of investigation and enforcement under the Act.

Section 4150, subdivision (d)

Purpose: Establish and specify the powers of the Board's investigators.

Necessity: Investigators must be authorized to issue notices of probable violation to initiate the enforcement process for violations of the Act or the regulations; and issue information letters to educate/inform the public of safe excavation practices. This section is necessary to delegate those powers to the Board's investigators and inform users of those powers of the Board's investigators. Without delegated authority to investigators, the Board will not be able to carry out its duties of investigation and enforcement under the Act.

Section 4151, subdivision (a)

Purpose: Establish and specify the evidence collected by the Board's investigators.

Necessity: Investigators must be able to inspect, examine, gather, and maintain records to conduct a complete and thorough investigation. Without such powers, an investigator would be unable to verify findings and come to a legitimate conclusion as to the facts of an incident and probable violation by an excavator or operator.

Section 4151, subdivision (b)

Purpose: Establish and specify that excavators and operators must provide the Board's investigators with access to sites, facilities, and records to conduct an investigation.

Necessity: Excavators and operators must facilitate an investigation by giving the investigators access to sites, facilities, and records, and removing barricades and plates so that the investigators may conduct a full investigation by inspecting, examining, and gathering relevant evidence to determine the underlying cause of the problem and whether a notice of probable violation must be issued.

Section 4151, subdivision (c)

Purpose: Establish and specify that obstruction of an investigation is a violation that is subject to sanctions.

Necessity: This provision is necessary to dissuade excavators and operators from committing acts or omissions to prevent, hinder, or impede the investigative process which purpose is to determine the underlying cause of the problem and whether a notice of probable violation must be issued.

Section 4200, subdivision (a)

Purpose: Specify the categories of sanctions to deter and address violations of the Article and regulations.

Necessity: Excavators and operators must be made aware of the sanctions an excavator or operator may be subject to if the excavator or operator is found to be in violation of the Article or regulations. An order for corrective action may effectively address the root cause of the violation and prevent future violations, and thus, likely increase safe excavation practices and prevent damage to subsurface installations. Monetary penalties for negligent

or willful and knowing violations may be assessed pursuant to Government Code section 4216.6.

Section 4200, subdivision (b)

Purpose: Clarify that the section does not limit or bar other or additional sanctions under another state agency's authority.

Necessity: Excavators and operators must be made aware that the section does not prevent other state agencies (Registrar of Contractors of the Contractors State License Board ("CSLB"), Public Utilities Commission ("CPUC"), or the Office of the State Fire Marshal ("OSFM")) from assessing other or additional sanctions that may be under those state agencies' powers.

Section 4201, subdivision (a)

Purpose: Interpret and clarify the mandated considerations for the Board, CSLB, CPUC, and OSFM to assess sanctions under Government Code section 4216.19.

Necessity: The considerations that must be deliberated to assess sanctions under Government Code section 4216.19 must be interpreted and clarified to identify the factors that will be considered to assess sanctions, which must be graduated to fairly weigh the violation against the appropriate sanction. The type of violation and its gravity may be measured by assessing the effect or risk of effect of the violation. The degree of culpability may be measured by the respondent's involvement in the violation, which includes actions or omissions by others.

Section 4201, subdivision (b)

Purpose: Specify additional considerations to assess sanctions for the Board, CSLB, CPUC, and OSFM.

Necessity: Additional considerations may be necessary to ensure that all relevant factors are weighed to assess a sanction, beyond just the five considerations required under Government Code section 4216.19. Proactive notification of the violation and cooperation with the investigatory authority encourage self-reporting so that investigators may investigate a possible violation as soon as possible, and produce more efficient and effective investigations. Smaller businesses may be more greatly affected by a sanction, compared to larger businesses; and thus, the size of the business may be considered to assess an appropriate sanction. Excavators and operators should not financially benefit from a violation, where the costs or economic benefit gained from violating the Article would be more beneficial to the excavator or operator than the cost of the sanction. If an excavator or operator was previously made aware of unsafe activities that may lead to a violation or informed of opportunities to receive education and training, the enforcing state agency must be able to weigh this consideration to assess sanctions. Additionally, state agencies with enforcement authority must be able to consider other relevant factors as violations, facts, and evidence are not identical for all cases.

Section 4201, subdivision (c)

Purpose: Specify additional considerations for the Board, CSLB, CPUC, and OSFM to assess an order for corrective action instead of a monetary penalty to effectively address the root cause of the problem that led to the violation.

Necessity: An order for corrective action instead of a monetary penalty in certain circumstances may be appropriate where the respondent is willing and able to comply with the order, respondent self-reported the violation, respondent cooperated with state agencies during the investigation, violation did not cause grave or significant harm or pose a significant risk of harm, respondent did not act willfully or knowingly, respondent does not have a pattern of violations, the respondent has a history of work conducted without violations, and/or the respondent took actions to mitigate safety consequences of a violation. Additionally, state agencies with enforcement authority must be able to consider other relevant factors as violations, facts, and evidence are not identical for all cases. An objective of the Article is to improve excavation safety near subsurface installations in the state. The effectiveness of an intervention method in effecting behavior change is dependent on the cause of the misbehavior. All else being equal, most persons in regulated industries want to be both safe and compliant with the law, and for those people, requiring a corrective action—be it education, process or procedure change, or facility or equipment repair/testing/replacement—will be more effective in eliciting improvement than monetary penalties. Furthermore, punishing unintentional errors can cause businesses and—more importantly—people within those businesses, not to share safety-related errors. The more localized the penalty to an individual, the greater the negative effect on communication. Increased communication about safety leads to improved safety. Cultures that limit communication limit safety performance. Safety performance in a production-focused industry is determined by how internal personnel interact with external forces, and the Board is but one of these external forces. Directing an entity to correct intentional or reckless non-compliances will not elicit behavior change, but is instead more likely to create surface-level compliance without addressing the underlying cause of the reckless or willful noncompliance. Repeated violations and failure to implement corrective actions may be indicators of reckless or willful non-compliance. In this case, monetary penalty is the most effective tool in creating compliance.

Section 4201, subdivision (d)

Purpose: Specify penalties for noncompliance with an order for corrective action to enforce the order and ensure compliance with the Article.

Necessity: Monetary penalties may need to be assessed for failure to comply with an order for corrective action. Potential monetary penalties are necessary to ensure compliance with a corrective order. State agencies must also be able to verify compliance through access to records, sites, and facilities.

Section 4250

Purpose: Specify and clarify the effective date of the Board's enforcement authority under title 19, division 4, chapter 3, article 2, of the proposed regulations to conform with Government Code section 4216.6.

Necessity: Pursuant to Government Code section 4216.6, although the Board is authorized to conduct investigations and recommend enforcement by other state agencies, the Board may not take enforcement action against persons under its jurisdiction until July 1, 2020. Therefore, implementing regulations regarding enforcement (title 19, division 4, chapter 3, article 2, of the proposed regulations) must be clarified to specify that the Board does not have enforcement authority under the regulations until July 1, 2020, consistent with Government Code section 4216.6.

Section 4251, subdivision (a)

Purpose: Specify how a respondent will be notified of a probable violation of the Article or regulations, and the necessary information in the notice so that the respondent is aware of the probable violation and options to respond to the notice.

Necessity: Excavators and operators must be informed of a probable violation found by the Board's investigator, including pertinent information to respond to the notice, such as the specific statute, regulation, or order that the excavator or operator is alleged to have violated, along with the evidence that supports the alleged violation, amount of the penalty, corrective action, and the options available to the respondent to respond or challenge the alleged violation and supporting evidence. Those under the Board's jurisdiction must be given due process to challenge the notice or evidence before a sanction is ordered by the Board (California Constitution Art. I § 7). For fairness and transparency, those under another state agency's jurisdiction must be informed of the probable violation and possible recommendation by the Board for enforcement by that state agency, and given the opportunity to ask that the Board not to recommend enforcement or recommend a lower or different sanction.

Section 4252, subdivision (a)

Purpose: Specify the options to respond to a notice of probable violation to provide due process for those under the Board's jurisdiction, and opportunity to address the Board for those not under the Board's jurisdiction.

Necessity: The Board must afford respondent due process before issuing a sanction: notice, opportunity to be heard, fair hearing, unbiased decision-maker, and decision based on the record (California Constitution Art. I § 7). The options provide a respondent under the Board's jurisdiction with several avenues to address the notice of probable violation: no contest, written submission, informal hearing before the Board, and formal hearing before an administrative law judge under the Administrative Procedure Act. The options provide a respondent under another state agency's jurisdiction with several avenues to address the notice of probable violation: no contest, written submission, informal hearing before the Board, and contest with request for the Board to make a recommendation to the state agency with jurisdiction over the respondent. Page limit and size, as well as text restrictions are necessary for a respondent to submit a succinct explanation that can be read by staff, Board members, and the public; and to fairly ration the Board's limit resources (includes time) among the cases pending with the Board. The page and text restrictions, as well as request to extend the restrictions, are similar to those imposed by courts. The deadlines provide respondent sufficient time to respond and provide the Board sufficient time to schedule a public meeting in accordance with the Bagley Keene Open Meeting Act.

Section 4252, subdivision (b)

Purpose: Specify when a respondent will be informed of a public hearing on the respondent's notice of probable violation and when a respondent will be informed of the Board's decision or recommendation.

Necessity: A respondent should be given sufficient time of 20 business days to decide whether to attend a public meeting regarding the respondent's notice of probable violation, and to prepare for the public meeting, if necessary (notice under the Bagley Keene Open Meeting Act must be given at least 10 days before the meeting). A respondent should also

be informed of any Board decision or recommendation regarding the respondent's notice of probable violation so that the respondent may pay the penalty (if any), complete the corrective action (if any), request reconsideration, or await enforcement proceedings under the appropriate state agency with jurisdiction over the respondent. Two business days is sufficient time for staff to send the request to the respondent and gives sufficient time for the respondent to act on the Board's decision (request reconsideration or pay any penalty).

Section 4252, subdivision (c)

Purpose: Specify how the respondent will be affected if the respondent fails to respond as provided in the section.

Necessity: If a respondent fails to respond in accordance with the section, the Board must be able to continue to process the notice of probable violation and issue a decision or recommendation. By failing to select any option to respond, the respondent has waived respondent's right to address the Board regarding the notice of probable violation.

Section 4253, subdivision (a)

Purpose: Specify the informal hearing process so that a respondent is given due process (California Constitution Art. I § 7) or given the opportunity to challenge the notice of probable violation and possible recommendation before the Board. This section serves to notify the respondent of when the informal hearing will take place so that the respondent can prepare for an informal hearing, and the option to submit a written explanation to the Board so that the respondent is given the opportunity to submit records for the Board's consideration at the informal hearing.

Necessity: The Board must be able to convene a quorum, as required under the Bagley Keene Open Meeting Act. 60 business days may be sufficient time to do so, but due to different schedules of nine Board members, the Board must be able to extend the time so that the Board may meet when a quorum can be gathered. The timeframe also gives respondent sufficient time to prepare for the informal hearing. The timeframe, along with section 4252, subdivision (b), is longer than the minimum notice requirements under the Bagley Keene Open Meeting Act (10 days). Respondent also has the option to ask for an extension if there is no corrective action in the notice of probable violation, as time is of the essence with a corrective action. Staff must receive the request no later than 15 business days before the hearing date in order to make other arrangements for location space and comply with the Bagley Keene Open Meeting Act notice requirements. The request may only be made once for good cause because the informal hearing process may not be unreasonably delayed. Respondent may submit a written response with other records to support respondent's arguments at the informal hearing. Page limit and size, as well as text restrictions are necessary for a respondent to submit a succinct explanation that can be read by staff, Board members, and the public. The page and text restrictions are similar to those imposed by courts.

Section 4253, subdivision (b)

Purpose: Clarify that the informal hearing process is not subject to rules relating to admission of evidence.

Necessity: The informal hearing process is not subject to the Administrative Procedure Act or formal rules of evidence. But, the Board may exclude certain evidence to conduct an orderly informal hearing and efficient, effective review of relevant evidence.

Section 4253, subdivision (c)

Purpose: Specify the informal hearing process so that a respondent is given due process (California Constitution Art. I § 7) or given the opportunity to challenge the notice of probable violation and possible recommendation before the Board.

Necessity: Presentation order and time limits are necessary to conduct an efficient and effective informal hearing, which is similar to appellate courts. To ensure fairness, each side is given the same amount of time and opportunity to present and rebut. The Board must be able to ask questions to staff, respondent, and other witnesses or experts who may be present at the informal hearing in order to thoroughly review and examine all evidence before making a decision or recommendation.

Section 4253, subdivision (d)

Purpose: Specify the informal hearing process so that a respondent is given due process (California Constitution Art. I § 7) or given the opportunity to challenge the notice of probable violation and possible recommendation before the Board. Clarify the conditions under which a respondent may arrange for a stenographer or court reporter to transcribe the informal hearing.

Necessity: The Board cannot bear the cost of a stenographer or court reporter for all informal hearings. If respondent wishes to have a stenographer or court reporter at the informal hearing, the respondent may do so under certain conditions. Staff must receive the request no later than 15 business days before the hearing date in order to make arrangements for the stenographer or court reporter, including proper location space, and comply with the Bagley Keene Open Meeting Act notice requirements. The Board must receive a complete copy of the transcript so that the Board has all of the relevant evidence the respondent possesses.

Section 4253, subdivision (e)

Purpose: Specify the informal hearing process so that a respondent is given due process (California Constitution Art. I § 7) or given the opportunity to challenge the notice of probable violation and possible recommendation before the Board.

Necessity: The Board must issue a decision or recommendation as authorized under Government Code section 4216.6. Respondent should be made aware of when the Board will do so. The timeframe is necessary to convene a quorum of Board members and arrange a public meeting in accordance with the Bagley Keene Open Meeting Act.

Section 4254, subdivision (a)

Purpose: Specify and clarify the formal hearing process so that a respondent is given due process (California Constitution Art. I § 7).

Necessity: If a respondent elects the formal hearing option, the hearing will be conducted in accordance with the Administrative Procedure Act and implementing regulations before an administrative law judge. The Board must have the option to record the hearing electronically instead of by a stenographer or court reporter when feasible to minimize costs of the hearing. The Board must be able to recover costs under certain conditions, which are similar to those under other state law such as Business and Professions Code section 5107 and California Code of Regulations, title 16, section 317.5. The conditions also include factors that must be considered for cost recovery under *Zuckerman v. State Board*

of Chiropractic Examiners (2002) 29 Cal. 4th 32.

Section 4254, subdivision (b)

Purpose: Specify and clarify the formal hearing process so that a respondent is given due process (California Constitution Art. I § 7).

Necessity: This subdivision is necessary to inform the respondent that the Board will issue a decision in accordance with the Administrative Procedure Act.

Section 4255, subdivision (a)

Purpose: Specify the procedures for a request for reconsideration so that a respondent has the opportunity to ask the Board to reconsider its decision or recommendation in light of new evidence.

Necessity: A respondent should be given the opportunity to ask the Board to reconsider its decision or recommendation in light of new evidence. Using the reconsideration process to rehash evidence already considered by the Board would not change the Board's decision or recommendation as there is nothing new to be considered. The Board must be able to convene a quorum, as required under the Bagley Keene Open Meeting Act. 60 business days may be sufficient time to do so, but due to different schedules of nine Board members, the Board must be able to extend the time so that the Board may meet when a quorum can be gathered. The timeframe gives respondent sufficient time to prepare for the public meeting if respondent wishes to attend. The timeframe is longer than the minimum notice requirements under the Bagley Keene Open Meeting Act (10 days). As time is of the essence with a corrective action, the request for reconsideration ordinarily does not stay an order for corrective action.

Section 4255, subdivision (b)

Purpose: Specify and clarify the procedures for a request for reconsideration so that a respondent has the opportunity to ask the Board to reconsider its decision in accordance with the Administrative Procedure Act.

Necessity: Respondent should be made aware of respondent's option to request reconsideration under the Administrative Procedure Act. The timeframe to do so is 5 days because the Board only has 30 days to act on the request under the Administrative Procedure Act. The notification timeframe meets the minimum notice requirement under the Bagley Keene Open Meeting Act (10 days).

Section 4256, subdivision (a)

Purpose: Specify when and how a penalty ordered by the Board must be paid.

Necessity: Penalties must be deposited into the Safe Energy Infrastructure and Excavation Fund – Enforcement Account (Gov. Code section 4216.24). Payment must be made by certified check or money order as personal or business checks may be returned due to insufficient funds. 30 days is generally a reasonable timeframe to pay a penalty.

Section 4256, subdivision (b)

Purpose: Specify when and how a respondent must comply with a corrective action ordered by the Board.

Necessity: Those under the jurisdiction of the Board must comply with an order for corrective in the manner and timeframe specified by the Board in its decision. This section

is required for the Board to enforce the Article and the regulations on those under the Board's jurisdiction.

Section 4256, subdivision (c)

Purpose: Specify when and how a penalty ordered by the CSLB, CPUC, or OSFM must be paid. Specify when and how a respondent must comply with a corrective action ordered by the CSLB, CPUC, or OSFM.

Necessity: Penalties must be deposited into the Safe Energy Infrastructure and Excavation Fund – Enforcement Account (Gov. Code section 4216.24). Payment must be made by certified check or money order as personal or business checks may be returned due to insufficient funds.

Section 4256, subdivision (d)

Purpose: Specify and clarify that failure to pay the penalty ordered by the Board, CSLB, CPUC, or OSFM, may be enforced by the Attorney General (Gov. Code section 4216.6, subdivision (b)).

Necessity: Failure to pay a penalty ordered by the Board, CSLB, CPUC, or OSFM, is a violation of the Article and the regulations that may be enforced by the Attorney General in a civil action under Government Code section 4216.6, subdivision (b). The Board and state agencies need a course of action if a respondent fails to pay a penalty as ordered by the Board or state agency.

Section 4257

Purpose: Specify the respondent's responsibility to maintain valid and current contact information with the Board.

Necessity: Respondent's contact information (phone number, email, and mailing or business address) is necessary for the Board to inform respondent of public meetings and hearings, and send correspondence and decisions or recommendations related to a notice of probable violation.

Section 4258

Purpose: Specify when ex parte communication with Board members and staff is permissible.

Necessity: Ex parte communication on substantive issues with Board members and staff after the notice of probable violation until the Board has reached a decision or recommendation, and from the request for reconsideration (if any) is filed until the Board issues a written decision on the request for reconsideration, must be prohibited to ensure that the Board decides the matter based only on the record before the Board during a public meeting in accordance with the Bagley Keene Open Meeting Act. However, it may be necessary for respondent to contact staff regarding basic procedural issues, such as scheduling a hearing, to comply with the procedures/process under the regulations.

Section 4300

Purpose: Specify and clarify the effective date of the proposed regulations to conform with Government Code section 4216.10.

Necessity: Government Code section 4216.11 requires the Board to adopt regulations to establish minimum elements for onsite meetings, and minimum requirements for the

mutually agreed-upon plan described in Government Code section 4216.10, subdivision (c)(1), on or before January 1, 2020. However, Government Code section 4216.10, subdivision (c)(1), is not effective until July 1, 2020. Thus, the regulations must inform users that the sections concerning areas of continual excavation under chapter 4 of the proposed regulations is effective beginning July 1, 2020, consistent with the statute.

Section 4350, subdivision (a)

Purpose: Specify and clarify the locate and field mark requirements for agricultural operations prior to an onsite meeting between the excavator (farmer) and the operator.

Necessity: Each time a farmer contacts a one call center to notify it of a proposed excavation, the farmer must delineate the proposed excavation area prior to an operator locating the existence of any subsurface installations within the proposed excavation area, and marking that location using methods such as colored paint and flags. The Board heard from farmers frustrated with field mark methods, particularly flags, used to mark a field that hindered operations because of how the materials interacted with the equipment. Farmers informed the Board this was the only option they were given by the operator representative to mark the field. After considering the feedback, the Board determined that the locate and field mark requirements for agriculture operations should include a discussion between the farmer and the subsurface installation operator to agree upon the best field mark method to be used in the excavation area. The proposed regulation requires the farmer and the operator to reference the field mark guidelines in Appendix B of the “Guidelines for Operator Facility Field Delineation” published in the most recent version of the Best Practices guide of the Common Ground Alliance (“CGA”) and in conformance with the uniform color code of the American Public Works Association. “CGA Best Practices” is released annually, and used as a resource in the industry for underground damage prevention. It’s a nationally recognized guide, and referencing it in the regulations is necessary to keep consistent with nationally recognized standards, and as referenced in the definition of “locate and field mark” under Government Code section 4216, subdivision (n).

Section 4351, subdivision (a)

Purpose: Establish and specify location, date, and time requirements for the onsite meeting between the farmer and the operator.

Necessity: When an excavator requests a ticket for a proposed excavation area, each subsurface installation operator with underground facilities in or near the proposed excavation receives a locate and field mark request from an excavator. In cases where a high priority subsurface installation exists, an onsite meeting must occur on the site of the proposed excavation area. The Board heard from farmers frustrated with the current onsite meeting process, including: 1) concerns over operators not showing up for scheduled meetings, and how that impacts operations, and 2) concerns over worker safety when meetings are scheduled during the afternoon in the summer, when temperatures were above 100-degrees. The Board also heard from operators concerned about the potential influx of annual tickets, and how future onsite meetings could put a strain on staffing. After considering the feedback, the Board determined that the farmer and operator must come to a mutually agree-upon date and time for the onsite meeting that does not unreasonably disrupt either party’s business operations. The proposed regulation requires the onsite meeting to occur on the parcel of real property where the high priority subsurface installation is present, at a mutually agreed-upon date and time. This is necessary to

ensure both parties can comply with the law without causing disruptions to business operations, by way of money lost for having to stop work, or strains on staffing to respond to multiple onsite meeting requests.

Section 4351, subdivision (b)(1)(A)

Purpose: Establish the level of knowledge and authority the excavator who attends the onsite meeting must have to discuss the excavation that will be taking place in the proposed excavation area.

Necessity: Government Code section 4216.10, subdivisions (a) and (c)(1), allows a farmer to call the appropriate one call center, and request an annual ticket for areas of continual excavation. In cases where a high priority subsurface installation exists, an onsite meeting must occur between the farmer and the operator. The Board heard from operators concerned over who would be responsible for managing the area of continual excavation plan and ticket. After considering the feedback, the Board determined that the farm owner or lessee or their authorized representative must attend the meeting. The proposed regulation requires the representative who attends the meeting to have knowledge of and information regarding the agricultural operations that will occur in the area of continual excavation during the period covered by the ticket. This is necessary to ensure the person with the knowledge and authority to discuss the excavation and equipment to be used is at the onsite meeting which will allow for an informed discussion about safe excavation practices.

Section 4351, subdivision (b)(1)(B)

Purpose: Establish the level of knowledge and authority the excavator who attends the onsite meeting must have to develop and agree to the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)).

Necessity: Knowledge and authority to develop and agree to the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) allows for the farmer to disseminate all the information needed by the operator, or their representative, to understand the scope of excavation taking place through the duration of the ticket, and agree to the excavation performed near their high priority subsurface installation. It also allows for the farmer and the operator, or their representative, to have an informed discussion about safe excavation practices around the high priority subsurface installation, and execute the agreement at the onsite meeting without delay.

Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020))

Purpose: Establish a standard agreement to be used for all onsite meetings for high priority subsurface installations in areas of continual excavation on agricultural property.

Necessity: Government Code 4216.11 requires the Board to establish minimum elements for a mutually agreed-upon plan of excavation activities to take place within 25 feet of each side of the high priority subsurface installation in the area of continual excavation. The plan must be created and signed by the farmer and operator. Through stakeholder outreach, the Board discovered most operators use a standard form or checklist for all onsite meetings, but do not have a process that is specifically tailored to agriculture. The Board heard from multiple farmers about their frustration with the current onsite meeting process, and the

inconsistency in information they experienced from different operators, and sometimes among representatives from the same operators. The Board also heard from operators concerned about who would be allowed to excavate under the annual area of continual excavation ticket, and how information about safe digging practices would be disseminated to employees and contracted workers. After considering the feedback, the Board decided it was necessary to create a standard agreement form to be used at all onsite meetings between farmers and operators to streamline the onsite meeting process and help ensure that the parties address the minimum elements for an agreed-upon plan. The form includes all necessary information for an onsite meeting and minimum elements for an agreed-upon plan: space for the farmer to describe the excavation activity to take place in the excavation area for the year so that both parties are aware of the work performed in the area during the year, space to record the description and location of the high priority subsurface installation so that both parties have the same understanding of the exact location and description of the high priority subsurface installation, space to record both parties' contact information, and space for each party's signature indicating their agreement to the plan. The form also includes requirements that the farmer will communicate information about the terms and conditions of the agreement to all workers, including any subcontractors, who perform work in the area of continual excavation. Including this information is necessary to establish the farmer's responsibility to make sure all employees and subcontractors are aware of the limited excavation activities and high priority subsurface installations in the area so that they can work safely around the high priority subsurface installations.

Section 4351, subdivision (b)(2)(A)

Purpose: Establish the level of knowledge and authority the operator who attends the onsite meeting must have to discuss the excavation that will be taking place in the proposed excavation area.

Necessity: Government Code section 4216.10, subdivision (a) and (c)(1), allows a farmer to call the appropriate one call center, and request an annual ticket for areas of continual excavation. In cases where a high priority subsurface installation exists, an onsite meeting must occur between the farmer and the operator. The Board heard from multiple farmers concerned over the lack of knowledge of the location of the high priority subsurface installation, normal farming practices, and farm equipment among the operator representatives they interact with during onsite meetings. Farmers also voiced frustration over operator representatives who signed off on specific equipment, only to have a different representative come out at a later date and say the same equipment was too dangerous to operate over the high priority subsurface installation. After considering the feedback, the Board determined that the operator at the onsite meeting must have knowledge of the location of the high-priority subsurface installation, such as a superintendent, supervisor, or engineer. The proposed regulation requires the operator who attends the onsite meeting to have knowledge of and information regarding all relevant information concerning the location of the high priority subsurface installation in the proposed excavation area. This is necessary to ensure the person with the knowledge and authority to discuss the location of the high priority subsurface installation is at the onsite meeting which will allow for an informed discussion about safe excavation practices.

Section 4351, subdivision (b)(2)(B)

Purpose: Establish the level of knowledge and authority the operator who attends the

onsite meeting must have to review and agree to the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)).

Necessity: Knowledge and authority to develop and agree to the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) allows for the operator to disseminate all the information needed by the farmer, or their representative, to understand the location of the high priority subsurface installation through the proposed excavation area, and plan excavation activities accordingly. It also allows for the operator and the farmer to have an informed discussion about safe excavation practices around the high priority subsurface installation, and execute the agreement at the onsite meeting without delay.

Section 4351, subdivision (b)(3)

Purpose: Establish the requirement for the excavator and operator to complete the Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)) prior to beginning excavation.

Necessity: Government Code 4216.10, subdivision (c)(1), requires the farmer and operator to have an onsite meeting, when the area of continual excavation includes, or is within 10 feet of, a high priority subsurface installation. This meeting must take place prior to the start of excavation, and requires the farmer and the operator to develop a mutually agreed upon plan for excavation activities that may be conducted within 25-feet of each side of the high priority subsurface installation. The Board heard concerns from farmers about consistency in the current onsite meeting process, stating the message is different among operators, and in some cases, is inconsistent among representatives from the same operator. The Board also heard concerns from operators about farmers who excavate over high priority subsurface installations without a ticket. After considering the feedback, the Board determined it was necessary to require farmers and operators to complete a standard form, Area of Continual Excavation Agreement – Agricultural Operations (Form No. ACE Agreement 01 (07-01-2020)), that included the minimum elements that needed to be discussed at the onsite meeting to ensure consistency among excavators and operators and better ensure that the parties address all the minimum elements.

Section 4351, subdivision (c)(1)(A)

Purpose: Establish and specify the responsibility of the operator to demonstrate the exact location of the high-priority subsurface installation through documentation if the operator's understanding differs from the farmer's understanding.

Necessity: Government Code 4216.4, subdivision (a)(1), requires an excavator to determine the exact location of any subsurface installations in conflict with the excavation. The Board heard concerns from farmers about consistency in the current process among operators. On many occasions, farmers reported being told they had to pothole to find the exact location of the subsurface installation every time they called in a ticket for excavation work over the operator's subsurface installation. In one case, a farmer said two of his workers were potholing in the heat of the day, in mixed soils, down several feet into the ground, which if not done properly is a safety risk. Most agricultural operations do not train their employees in excavation safety, because it is not relevant to everyday operations. Farmers told the Board they work the same land every year, and have knowledge of where the subsurface installations are across the field, and they keep records. They also told the Board, stopping work to pothole the field for every ticket is expensive and time consuming.

Meanwhile, operators expressed concern over the use of farming equipment that penetrates the ground over their subsurface installations without knowledge of the exact location of the subsurface installation. After considering the feedback, the Board determined that while it was the responsibility of the farmer to be aware of the exact location of the high priority subsurface installation under Government Code section 4216.4, in the case of a disagreement over the exact location of the high priority subsurface installation it was the operator's responsibility to demonstrate why the operator believes the excavator's understanding of the exact location of the high priority subsurface installation is incorrect. This is necessary to resolve disputes regarding the exact location of the high priority subsurface installation, and allow the operator an opportunity to demonstrate the operator's understanding of the exact location of the high priority subsurface installation through documentation to prevent damage to the high priority subsurface installation during excavation.

Section 4351, subdivision (c)(1)(B)

Purpose: Establish and specify the responsibility of the operator to demonstrate the exact location of the high-priority subsurface installation by exposing the high priority subsurface installation if the operator's understanding differs from the farmer's understanding.

Necessity: Government Code 4216.4, subdivision (a)(1), requires an excavator to determine the exact location of any subsurface installations in conflict with the excavation. The Board heard concerns from farmers about consistency in the current process among operators. On many occasions, farmers reported being told they had to pothole to find the exact location of the subsurface installation every time they called in a ticket for excavation work over the operator's subsurface installation. In one case, a farmer said two of his workers were potholing in the heat of the day, in mixed soils, down several feet into the ground, which if not done properly is a safety risk. Most agricultural operations do not train their employees in excavation safety, because it is not relevant to everyday operations. Farmers told the Board they work the same land every year, and have knowledge of where the subsurface installations are across the field, and they keep records. They also told the Board, stopping work to pothole the field for every ticket is expensive and time consuming. Meanwhile, operators expressed concern over the use of farming equipment that penetrates the ground over their subsurface installations without knowledge of the exact location of the subsurface installation. After considering the feedback, the Board determined that while it was the responsibility of the farmer to be aware of the exact location of the high priority subsurface installation under Government Code section 4216.4, in the case of a disagreement over the exact location of the high priority subsurface installation it was the operator's responsibility to demonstrate why the operator believes the excavator's understanding of the exact location of the high priority subsurface installation is incorrect. The proposed regulation requires the operator to expose the high priority subsurface installation at a date and time, in a manner, and with the device agreed upon by the farmer and the operator (one of the two available methods). This is necessary to resolve disputes regarding the exact location of the high priority subsurface installation, and allow the operator an opportunity to demonstrate the operator's understanding of the exact location of the high priority subsurface installation by exposing the high priority subsurface to prevent damage to the high priority subsurface installation during excavation.

Section 4360, subdivision (a)(1)

Purpose: Specify and clarify the locate and field mark requirements for flood control operations prior to an onsite meeting between the excavator and the operator.

Necessity: Each time an excavator contacts a regional notification center to notify it of a proposed excavation, the excavator must delineate the proposed excavation area prior to an operator locating the existence of any underground facilities within the proposed excavation area, and marking that location using methods such as colored paint and flags. The proposed regulation enables the excavator and the operator to determine and agree upon the best marking method for the excavation area. It also requires both parties to reference the field mark guidelines in Appendix B of the “Guidelines for Operator Facility Field Delineation” published in the most recent version of the Best Practices guide of the Common Ground Alliance (“CGA”) and in conformance with the uniform color code of the American Public Works Association. “CGA Best Practices” is an annual guide used as a resource in the industry for underground damage prevention. It’s a nationally recognized guide, and referencing it in the regulations is necessary to keep consistent with nationally recognized standards, and as referenced in the definition of “locate and field mark” under Government Code section 4216, subdivision (n).

Section 4361, subdivision (a)

Purpose: Establish and specify location, date, and time requirements for the onsite meeting between flood control facility excavator and the operator.

Necessity: When an operator receives a locate and field mark request from an excavator, they have two working days to respond to the request by locating and field marking the proposed excavation area, unless the excavator and the operator mutually agree to a later start date and time. In cases where a high-priority subsurface installation exists, an onsite meeting must occur at a mutually agreed upon date and time. The Board determined that the excavator and operator must come to a mutually agreed-upon onsite meeting that does not unreasonably disrupt either party’s business operations. The proposed regulation requires the onsite meeting to occur on the parcel of real property where the high priority subsurface installation is present, at a mutually agreed-upon date and time. This is necessary for both excavators and operators to ensure they can comply with the law without causing disruptions to business operations, by way of money lost for having to stop work, or strains on staffing to respond to multiple onsite meeting requests.

Section 4361, subdivision (b)(1)(A)

Purpose: Establish the level of knowledge and information the excavator who attends the onsite meeting must have to discuss the excavation that will be taking place in the proposed excavation area.

Necessity: Government Code section 4216.10, subdivisions (a) and (c)(1), allows an excavator to call the appropriate one call center, and request an annual ticket for areas of continual excavation. In cases where a high priority subsurface installation exists, an onsite meeting must occur between the excavator and the operator. The Board determined that the excavator or their authorized representative must attend the meeting. The proposed regulation requires the person who attends the meeting to have knowledge of and information regarding the flood control operations that will occur in the area of continual excavation during the period covered by the ticket. This is necessary to ensure the person with the capability to discuss the excavation and equipment to be used is at the onsite

meeting which will allow for a knowledgeable discussion about safe excavation practices so that the parties can enter into a mutually agreed-upon plan.

Section 4361, subdivision (b)(1)(B)

Purpose: Establish the level of knowledge and authority the excavator who attends the onsite meeting must have to develop and agree to the Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)).

Necessity: Knowledge and authority to develop and agree to the Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)) allows for the excavator to disseminate all the information needed by the operator, or their representative, to understand the scope of excavation taking place through the duration of the ticket, and agree to the excavation performed near their high priority subsurface installation at the onsite meeting. It also allows for the excavator and the operator, or their representative, to have an informed discussion about safe excavation practices around the high priority subsurface installation, and execute the agreement at the onsite meeting without delay.

Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020))

Purpose: Establish a standard agreement to be used for all onsite meetings for high priority subsurface installations in areas of continual excavation on flood control facilities.

Necessity: Government Code 4216.11 requires the Board to establish minimum elements for a mutually agreed-upon plan of excavation activities to take place within 25 feet of each side of the high priority subsurface installation in the area of continual excavation. The plan must be created and signed by the excavator and operator. The Board decided it was necessary to create a standard agreement form to be used at all onsite meetings between excavators and operators to streamline the onsite meeting process and help ensure that the parties address the minimum elements for an agreed-upon plan. The form includes all necessary information for an onsite meeting and minimum elements for an agreed-upon plan: space for the excavator to describe the excavation activity to take place in the excavation area for the year so that both parties are aware of the work performed in the area during the year, space to record the description and location of the high priority subsurface installation so that both parties have the same understanding of the exact location and description of the high priority subsurface installation, space to record both parties' contact information, and space for each party's signature indicating their agreement to the plan. The form also includes requirements that the excavator will communicate information about the terms and conditions of the agreement to all workers, including any subcontractors, who perform work in the area of continual excavation. Including this information is necessary to establish the excavator's responsibility to make sure all employees and subcontractors are aware of the limited excavation activities and high priority subsurface installations in the area so that they can work safely around the high priority subsurface installations.

Section 4361, subdivision (b)(2)(A)

Purpose: Establish the level of knowledge and authority the operator who attends the onsite meeting must have to discuss the excavation that will be taking place in the proposed excavation area.

Necessity: Government Code section 4216.10, subdivision (a) and (c)(1), allows an excavator to call the appropriate one call center, and request an annual ticket for areas of continual excavation. In cases where a high priority subsurface installation exists, an onsite meeting must occur between the excavator and the operator. The Board determined that the operator at the onsite meeting must have knowledge of the location of the high-priority subsurface installation, such as a superintendent, supervisor, or engineer, to have a meaningful and fruitful discussion with the excavator to develop a mutually agreed-upon plan. The proposed regulation requires the operator who attends the onsite meeting to have knowledge of and information regarding all relevant information concerning the location of the high priority subsurface installation in the proposed excavation area. This is necessary to ensure the person with the knowledge and authority to discuss the location of the high priority subsurface installation is at the onsite meeting which will allow for an informed discussion about safe excavation practices.

Section 4361, subdivision (b)(2)(B)

Purpose: Establish the level of knowledge and authority the operator who attends the onsite meeting must have to review and agree to the Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)).

Necessity: Knowledge and authority to develop and agree to the Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)) allows for the operator to disseminate all the information needed by the excavator, or their representative, to understand the location of the high priority subsurface installation through the proposed excavation area, and plan excavation activities accordingly. It also allows for the operator and the excavator to have an informed discussion about safe excavation practices around the high priority subsurface installation, and execute the agreement at the onsite meeting without delay.

Section 4361, subdivision (b)(3)

Purpose: Establish the requirement for the excavator and operator to complete the Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)) prior to beginning excavation.

Necessity: Government Code 4216.10, subdivision (c)(1), requires the excavator and operator to have an onsite meeting when the area of continual excavation includes, or is within 10 feet of, a high priority subsurface installation. This meeting must take place prior to the start of excavation, and requires the excavator and the operator to develop a mutually agreed-upon plan for excavation activities that may be conducted within 25-feet of each side of the high priority subsurface installation. The Board determined it was necessary to require excavators and operators to complete a standard form, Area of Continual Excavation Agreement – Flood Control Facilities (Form No. ACE Agreement 02 (07-01-2020)), that included the minimum elements that needed to be discussed at the onsite meeting to ensure consistency among excavators and operators and better ensure that the parties address all the minimum elements.

Section 4361, subdivision (c)(1)(A)

Purpose: Establish and specify the responsibility of the operator to demonstrate the exact location of the high-priority subsurface installation through documentation if the operator's understanding differs from the excavator's understanding.

Necessity: Government Code 4216.4, subdivision (a)(1), requires an excavator to determine the exact location of any subsurface installations in conflict with the excavation. The Board determined that while it was the responsibility of the excavator to be aware of the exact location of the high priority subsurface installation under Government Code section 4216.4, in the case of a disagreement over the exact location of the high priority subsurface installation it was the operator's responsibility to demonstrate why the operator believes the excavator's understanding of the exact location of the high priority subsurface installation is incorrect. This is necessary to resolve disputes regarding the exact location of the high priority subsurface installation, and allow the operator an opportunity to demonstrate the operator's understanding of the exact location of the high priority subsurface installation through documentation to prevent damage to the high priority subsurface installation during excavation.

Section 4361, subdivision (c)(1)(B)

Purpose: Establish and specify the responsibility of the operator to demonstrate the exact location of the high-priority subsurface installation by exposing the high priority subsurface installation if the operator's understanding differs from the excavator's understanding.

Necessity: Government Code 4216.4, subdivision (a)(1), requires an excavator to determine the exact location of any subsurface installations in conflict with the excavation. The Board determined that while it was the responsibility of the excavator to be aware of the exact location of the high priority subsurface installation under Government Code section 4216.4, in the case of a disagreement over the exact location of the high priority subsurface installation it was the operator's responsibility to demonstrate why the operator believes the excavator's understanding of the exact location of the high priority subsurface installation is incorrect. The proposed regulation requires the operator to expose the high priority subsurface installation at a date and time, in a manner, and with the device agreed upon by the excavator and the operator (one of the two available methods). This is necessary to resolve disputes regarding the exact location of the high priority subsurface installation, and allow the operator an opportunity to demonstrate the operator's understanding of the exact location of the high priority subsurface installation by exposing the high priority subsurface installation to prevent damage to the high priority subsurface installation during excavation.